Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

JERRY RUBIN,

Petitioner,

v.

CITY OF SANTA MONICA; MARIA M. STEWART, CITY CLERK; BILL JONES, SECRETARY OF STATE; AND DOES 1-50, INCLUSIVE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Where the United States Supreme Court has expressly held that "speech about the qualifications of candidates for public office is 'at the core of our First Amendment freedoms'", and has consistently applied strict scrutiny to election regulations, was it error for the Ninth Circuit to apply the rational basis test and conclude that the City's and State's arbitrary and discretionary regulations on the three-word ballot designation of a candidate's occupation or vocation do not severely burden a candidate's First Amendment rights?

When the State opens up an election ballot to contain a three-word statement about a candidate's political qualifications (in the form of his or her occupation or vocation, as defined by the State), does the State create a limited public forum subject to strict First Amendment scrutiny?

PARTIES TO THE PROCEEDING

The following, and no others, are parties to the instant proceedings:

Petitioner JERRY RUBIN, who was the Plaintiff and Appellant in the courts below. Respondents are the CITY OF SANTA MONICA, a municipal corporation; MARIA M. STEWART, and individual and the Santa Monica City Clerk; BILL JONES, and individual and the California Secretary of State, each of whom were the Defendants and Appellees in the courts below.

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Petitioner respectfully seeks certiorari to review the Opinion by the Ninth Circuit Court of Appeals entered on October 17, 2002, affirming the Order Dismissing Case by the Central District Court of California entered on June 20, 2001, for which a *sua sponte* request for rehearing *en banc* failed to receive a majority vote on February 4, 2003.

CITATIONS TO OPINIONS BELOW

The Opinion of the Ninth Circuit Court of Appeals is found at Docket No. 01-56091, *Rubin v. City of Santa Monica, et al.*, 308 F.3d 1008 (9th Cir. 2001), and the Order Dismissing Case by the Central District of California is found at Docket No. CV-00-09544-JSL. The District Court did not publish an opinion in this case. The pertinent rulings appear in the attached appendix at *Appendix A* and *Appendix B*, respectively.

JURISDICTIONAL STATEMENT

The District Court for the Central District of California had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a)(3) and (4), this being an action arising under the federal constitution and laws, and under 28 U.S.C. §§ 2201 and 2202, this being an action for declaratory relief. On June 20, 2001, the District Court for the Central District of California entered its Order Dismissing Case Pursuant to its Order to Show Cause. Petitioners herein appealed the District Court's Order, over which the Ninth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291, and Federal Rules of Appellate Procedure Rules 1, 4(a), since the Order appealed from was a final order of dismissal of the entire action.

The Ninth Circuit Court of Appeals entered its Opinion affirming the District Court on October 17, 2002. On November 22, 2002, a *sua sponte* request for an *en banc* vote was received by Petitioner from the Ninth Circuit Court of Appeal [*Appendix C*], and on December 16, 2002, Petitioner and Respondent submitted simultaneous Supplemental Briefs re: Sua Sponte Request for Rehearing En Banc. On February 4, 2003, the Ninth Circuit entered an Order advising that the *sua sponte* request failed to receive a majority of the votes of the nonrecused active judges, and the *sua sponte* request was thereby rejected. [*Appendix D*].

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution, Section 1:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of

life, liberty, or property, without due process of law; nor deny to any person within the jurisdiction the equal protection of the laws.

California Elections Code § 13107:

[*See Appendix E*]

California Secretary of State Ballot Designation Regulations, California Administrative Code, Chapter 7 (commencing with § 20710):

[*See Appendix F*]

STATEMENT OF THE CASE

Petitioner Jerry Rubin was a duly qualified candidate for the Santa Monica City Council in the 2000 and 2002 elections, and intends to become a candidate in the next election. Petitioner Rubin has been told by Respondent Stewart, who acts for the City of Santa Monica, that he cannot call himself a "peace activist" on the election ballot in the three-word space allocated for designation of one's primary occupation/vocation.

Petitioner argues that in fact his primary occupation or vocation is, and has been for the past twenty years, best described as a peace activist, and that furthermore the ballot designation regulations are impermissibly vague and discretionary, allowing content based discrimination by the Respondents amongst the candidates as to whom will be allowed to call themselves what on the election ballot.

On August 11, 2000 (and again in 2002), Petitioner Rubin hand-delivered his nomination papers for candidacy to the Santa Monica City Council to the Santa Monica City Clerk, Maria M. Stewart. His filing included his Candidate's Statement and Ballot Designation pursuant to the City of Santa Monica's procedures and as set forth at the Santa Monica Municipal Code § 11.04.120 and the California Elections Code §§ 13107 and 13307, and at the California Administrative Code, Chapter 7, Sections 20710, *et seq.* [2 C.C.R. §§ 20710, *et seq.*]

In Petitioner Rubin's nomination papers, he identified his primary occupation/vocation as "Peace Activist". Respondent Stewart accepted Petitioner's nomination papers but told him that she was rejecting his Ballot Designation because it contained the word "activist". Ms. Stewart also informed Petitioner that "peace officer" would be allowed if Petitioner were a police officer, "environmental educator" might be allowed, but that "peace educator" would probably not be allowed, even though it does not contain the word "activist".

Ms. Stewart then gave Petitioner a copy of the State of California regulations regarding Ballot Designations, and indicated that Section 20716 purportedly prohibited the use of the word "activist". Respondent Stewart advised Petitioner that although she did not "have to" follow the state regulations as a matter of law, the City "chose" to do so. (However, on or about April 10, 2001, the City of Santa Monica proposed and adopted an ordinance "codify[ing] the City's current practice of following the Secretary of State's Ballot Designation Regulations".)

As a result of Respondent Stewart's and Respondent City of Santa Monica's refusal to accept Petitioner's ballot designation, he was the only candidate qualified by the City of Santa Monica *without* a Ballot Designation, the most visible identifier of election candidates in that local election. Plaintiff Rubin alleges that the "Ballot Designation Regulations", 2 C.C.R. §§ 20710, *et seq*., and California Elections Code § 13107 were discretionarily and unequally applied to him, so that he, unlike any other candidate, is not being allowed to accurately identify his vocation/occupation, and that his political speech is being impermissibly burdened.

Petitioner Rubin has had the primary vocation of peace activist for twenty years, having spent the vast majority of his time (well in excess of 40 hours per week) doing what can reasonably be described as "peace activist", and receiving all of his earned income, albeit small, from his anti-war and anti-violence activities.

He has organized and/or attended innumerable demonstrations, sent out thousands of press releases promoting peace, and has contacted and been contacted by reporters for every major newspaper and news organization and been interviewed hundreds of times on both local and national television and radio regarding such issues as the Gulf War, toy guns, the military budget, the need for peace education in early childhood, and the reduction of violence in film, TV and other media including in children's video games and toys.

He has extensively bought and sold message items relating to peace such as pamphlets, buttons, and bumper stickers, made thousands of phone calls, and been listed in the white pages of the phone book as well as on his business cards for many years as "Jerry Peace Activist Rubin".

He was an organizer of and participant in the 1986 Great Peace March, and walked from Los Angeles City Hall to the Lincoln Memorial in Washington D.C. He organized the 10th Anniversary Reunion of the Peace March that was attended by hundreds of the original marchers as well as by Mayor Riordan and former Mayor Bradley. He has been on over 20 hunger fasts to bring attention to peace issues. He and his wife were married at a public peace rally wedding in Santa Monica that was attended by approximately 400 individuals and was covered by the Los Angeles Times newspaper.

He organized the creation of a Mile Long Peace Scroll that he and others hand delivered and officially presented to the Secretary General of the United Nations. He organized rallies around the country to commemorate the creation of the peace symbol, and he has personally stamped the peace symbol on the hands of nearly half a million people, by his own calculations.

Thus, Petitioner's designation of his occupation/vocation as "peace activist" is neither misleading (the prevention of misleading designations being the expressly stated purpose of the regulations, see § 20716(a), California Elections Code § 13107(b)), nor "generic", but is an extremely accurate and specific designation of his actual vocation and exclusive source of income.

He meets the test for a "Vocation" found in the California regulations at § 20714(a)(2): "*Vocation" means a trade, a religious calling, or the work upon which a person, in most but not all cases, relies for his or her livelihood and spends a major portion of his time.*" He also meets the test for "Occupation" found at 2 C.C.R. § 20714(a)(3): "*Occupation"*

means the employment in which one regularly engages or follows as the means of making a livelihood." Nonetheless, the City of Santa Monica to this day persists in refusing to allow Plaintiff Rubin to identify his vocation/primary occupation as "peace activist" on its election ballot, and engages in a highly discretionary and content-based review of submitted ballot designations.

Regardless of whether or not "peace activist" is Petitioner's occupation or vocation, Rubin contends that the regulations are arbitrary, capricious, vague, overbroad, and unduly discretionary. Rubin contends that once the ballot was opened up to a three-word statement about political qualifications, the regulations thereon must past strict scrutiny because they impact core political speech under this Court's precedent.

REASONS FOR GRANTING THE PETITION

A. The Underlying Premise Of The Panel's Decision Conflicts Directly With the Position Of The U.S. Supreme Court And Other Circuits, In Which Ballot Designations And The Like Have Been Declared To Be Critical, Crucial, Climactic, And Core Speech

In it's decision, the Ninth Circuit panel held that California's system (adopted by the City of Santa Monica[1]) of allowing and regulating the placement of a candidate's "occupation or vocation" next to his or name on the election

1. Elections Code §§ 13107(a)(3), 13107(b) and the California Administrative Code, Chapter 7, § 20710, *et seq*. [2 Calif. Code Reg. 20710, *et seq*.], which codes and regulations are being interpreted by, utilized in, and applied to City of Santa Monica elections by the City Clerk under the auspices of the Santa Monica City Charter, Article 14, Section 14.03, and as codified by the City Council on or about April 10, 2001.

ballot is constitutional under the rational basis test, which the panel chose to apply because the regulation, it opined, is "politically neutral", does not severely burden a candidate's First Amendment rights, and is not unreasonable given the City's "[important] interest in preserving the simplicity of its ballot". *Rubin v. Jones*, 308 F.3d 1008 (9th Cir. 2002).

Petitioner contends that the panel is incorrect in several fundamental ways. First, in holding that the ballot designations minimally burden speech and constitute only minor restrictions, the panel's decision conflicts with the tenets of the recent U.S. Supreme Court decision, *Republican Party of Minnesota v. White*, 122 S. Ct. 2528, 536 U.S. 765, 153 L. Ed. 2d 694 (2002), in which the Supreme Court noted that **"speech about the qualifications of candidates for public office is 'at the core of our First Amendment freedoms'"**. *Id.*, 122 S. Ct. at 2534. The California Supreme Court, too, has noted that **"[a] major purport of the Elections Code is to insure the accurate designation of the candidate upon the ballot in order that an informed electorate may intelligently elect one of the candidates."** *Salinger v. Jordan*, 61 Cal.2d 824, 826, 40 Cal.Rptr. 361, 395 P.2d 49 (1964). The occupation of a candidate, when placed next to his or her name on the ballot, is plainly political speech about the qualifications of that candidate for office.

Although ignored by the Ninth Circuit, Justice Thomas discussed the proper analysis of election regulations in detail in 1999, in a concurring opinion:

> **When a State's election law directly regulates core political speech, we have always subjected the challenged restriction to strict scrutiny and**

required that the legislation be narrowly tailored to serve a compelling governmental interest. [citations]

Even where a State's law does not directly regulate core political speech, we have applied strict scrutiny. For example, in *Meyer v. Grant*, 486 U.S. 414, 100 L. Ed. 2d 425, 108 S. Ct. 1886 (1988), we considered a challenge to Colorado's law making it a felony to pay initiative petition circulators. We applied strict scrutiny because we determined that initiative petition circulation "of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Id.*, at 421. In *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 70 L. Ed. 2d 492, 102 S. Ct. 434 (1981), we subjected to strict scrutiny a city ordinance limiting contributions to committees formed to oppose ballot initiatives because it impermissibly burdened association and expression. *Id.*, at 294.

When core political speech is at issue, we have ordinarily applied strict scrutiny without first determining that the State's law severely burdens speech. Indeed, in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 131 L. Ed. 2d 426, 115 S. Ct. 1511 (1995), the Court suggested that we only resort to our severe/lesser burden framework if a challenged election law regulates "the mechanics of the electoral process," not speech. *Id.*, at 345; but see *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214,

222-223, 103 L. Ed. 2d 271, 109 S. Ct. 1013 (1989) (first determining that California's prohibition on primary endorsements by the official governing bodies of political parties burdened speech and association and then applying strict scrutiny).

I suspect that when regulations of core political speech are at issue it makes little difference whether we determine burden first because restrictions on core political speech so plainly impose a "severe burden."

. . .

The challenged badge requirement [citation] directly regulates the content of speech. The State requires that all petition circulators disclose, at the time they deliver their political message, their names and whether they were paid or unpaid. Therefore, the regulation must be evaluated under strict scrutiny. . . . Content-based regulation of speech typically must be narrowly tailored to a compelling state interest. [citations] The State's dominant justification for its badge requirement is that it helps the public to identify, and the State to apprehend, petition circulators who perpetrate fraud. Even assuming that this is a compelling interest, plainly, this requirement is not narrowly tailored. It burdens all circulators, whether they are responsible for committing fraud or not. In any event, the State has failed to satisfy its burden of demonstrating that fraud is a real, rather than a conjectural, problem. [citations]

Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999), concurring opinion by Thomas, J.

The Ninth Circuit panel took the view that the ballot designation regulation was not a severe burden; however, under the *Buckley* analysis, if a regulation concerns core political speech, "we have ordinarily applied strict scrutiny *without first* determining that the State's law severely burdens speech. [citations omitted]" *Id.* Even where the election regulation does not concern core political speech, as Justice Thomas wrote, strict scrutiny has been applied, not the rational basis test applied by the Ninth Circuit in this instance.

Second, the panel's decision also conflicts with the U.S. Supreme Court's fundamental assumptions most recently elucidated in *Cook v. Gralike*, 531 U.S. 510, 121 S. Ct. 1029, 149 L. Ed. 2d 44 (Feb. 28, 2001), in which the Supreme Court expressly noted the potential political damage of unfavorable ballot labels:

> **Indeed, it seems clear that adverse labels handicap candidates 'at the most crucial stage in the election process – the instant before the vote is cast.'** *Anderson v. Martin*, 375 U.S. 399, 402, 84 S. Ct. 454, 11 L. Ed. 2d 430 (1964). **At the same time, 'by directing the citizen's attention to the single consideration' . . . the labels imply that the issue 'is an important – perhaps paramount – consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot' against candidates** as unfaithful. . . . Thus, far from regulating the procedural mechanisms of elections, Article VII

> attempts to 'dictate electoral outcomes.' [citation omitted]. Such 'regulation' of congressional elections simply is not authorized by the Elections Clause.

Cook v. Gralike, 531 U.S. at 525.

Exactly why does California, unlike any other State, have not just a candidate's political party on the ballot, but also a candidate's "occupation or vocation", when the ballot, as the panel notes, has extremely limited space? Surely because, as the U.S. Supreme Court noted in *Gralike*, the State must consider that information extremely *important* — important enough, Appellant contends, to dictate electoral outcomes at the "**climactic moment of choice**" for the voter. *See Rosen v. Brown*, 970 F.3d 169, 175 (6th Cir. 1992).

In *Rosen*, the Sixth Circuit panel held that an Ohio election statute prohibiting placement of the "Independent" designation below a candidate's name on a general election ballot violated the First and the Fourteenth Amendments of the U.S. Constitution, and State's justifications for imposing the burden, including minimizing ballot-generated voter confusion, protecting integrity of established and formally recognized major political parties, and producing more manageable ballot, were *highly questionable*. *Rosen v. Brown*, *supra*.

Although the *Rosen* court did not apply the strict scrutiny test, it did note that "the questions presented by a challenge to a specific provision in a state's election law cannot be resolved by applying a "litmus-paper test. [citations omitted]," but rather must be analyzed under the balancing test iterated in *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S. Ct. 1564, 1570, 75 L. Ed. 2d 547 (1983), in which "the Supreme Court set forth an

analytical process for making such 'hard judgments' in the context of a challenge to a provision of a state's election laws." *Rosen*, 970 F.2d at 175. As the *Rosen* court noted:

> An election ballot is a State-devised form through which candidates and voters are required to express themselves at the climactic moment of choice. [citations omitted] With respect to the political designations of the candidates on nomination papers or on the ballot, a State could wash its hands of such business and leave it to the educational efforts of the candidates themselves, or their sponsors, during the campaigns. [citation omitted] **Once a State admits a particular subject to the ballot and commences to manipulate the content or to legislate what shall and shall not appear, it must take into account the provisions of Federal and State Constitutions regarding freedom of speech and association, together with the provisions assuring equal protection of the laws.** [citations omitted].

Id., at 175.[2]

Having decided that a candidate's occupation or vocation was important enough to put it on the election ballot, California, and consequently the City of Santa Monica, must be able to pass constitutional scrutiny in the legitimacy and strength of each

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2. The Ninth Circuit panel writes that "a ballot is a ballot not a bumper sticker." *Rubin*, at 1016. Petitioner points out that while that may be true in most states, California has voluntarily *turned* the ballot into a bumper sticker by including "three words" about the candidate's qualifications on the ballot, in addition to the usual party affiliation.

of its purported interests sufficient to overcome the burden on Petitioner's, and every other candidate's or potential candidate's rights. Petitioner Rubin submits that this has not been done.

Petitioner contends that the appellate panel in this case did not adequately contemplate the importance of the speech at issue (i.e., candidate qualifications, which the U.S. Supreme Court has recently called "core" to elections), the weight of the burden imposed by the ballot designation restriction (i.e., an arbitrary restriction on what the U.S. Supreme Court has recently called "the most crucial stage in the election process – the instant before the vote is cast"), and the weakness of the City's purported interests (i.e., the same interests regarding as insufficient by the Sixth Circuit in *Rosen*, which has been favorably cited 16 times since it was published).

Any speech that can change the outcome of elections is presumptively extremely important. This is all the more true in small local elections like that for Santa Monica City Council, where busy voters are unlikely to read or hear candidate information prior to election day, when they cast their ballots. In a presidential campaign, voters can hardly escape the national T.V. ads, the televised debates, the party mailings, etc., whereas local election candidates do not have that mass media exposure. Here you have a State election regulation that adds candidate qualifications to the ballot because those qualifications are *important* to a voter's decision, yet the Ninth Circuit panel said that the regulation "does not infringe on core political speech", *Rubin*, 308 F.3d at 1015-1016, and is simply a most minimal burden.

Petitioner contends that this ruling is fundamentally erroneous and in confict with this Court's precedent.

B. The Election Ballot Is A Limited Public Forum And The Ballot Designation Regulations Should Therefore Have Been Subject To Strict Scrutiny

The courts below essentially dismissed the forum issue altogether, with the District Court, for example, holding that, "It is clear that based upon a reading of the statute and accompanying regulations, that ballot designations are not intended to be a forum for political speech, but is to be a neutral, non-political description that designates either a profession, vocation or occupation."

Petitioner contends, however, that the issue is not nearly so simple and that in reality the ballot is a limited public forum under federal law. As recently as 1997, the Ninth Circuit itself held that:

> A forum created by the government to allow a limited class of speakers to address a particular class of topics, such as the voter's pamphlet here, is a limited public forum. *Kaplan v. County of Los Angeles*, 894 F.2d 1076, 1080 (9th Cir. 1990). As such content neutral restrictions must be shown "to serve a significant state interest in a narrowly tailored fashion and leave open ample alternative channels of communication." *Id.* (citing, *Perry Educ'n Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983).

NAACP v. Jones, 131 F.3d 1317 (9th Cir. 1997) (emphasis added); *see also International Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 120 L. Ed. 2d 541, 550, 112 S. Ct. 2701, 2705 (1992) ("The second category of public

property is the designated [limited] public forum, whether of a limited or unlimited character – property that the state has opened for expressive activity by part or all of the public.")

A content-based regulation of speech in a limited public forum is subject to strict scrutiny: "Regulation of such property is subject to the same limitation as that governing a traditional public forum." *Id.* Therefore, the courts below erred in applying the rational basis test, rather than the strict scrutiny test, for this reason as well.

C. Contrary To The Panel's Conclusions, The Regulation Of Ballot Designations Is Arbitrary, Discretionary And Non-Neutral, And "Activist" Is An Advertised Job Position Or Occupation

The Ninth Circuit also took the position that the regulations are neutral and non-arbitrary, and that furthermore "activist" is as a matter of fact (or law) simply a status. First, Petitioner points out that organizations such as the Sierra Club and Greenpeace, for example, regularly advertise in California for positions with the job title of "activist", and refer to "career opportunities and benefits" as an activist.[3]

Better highlighting the absurdity of the regulations, however, and the illegitimacy of the actual interest being served by the

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3. The definition of "Vocation" is found in the California regulations at § 20714(a)(2): "*Vocation" means a trade, a religious calling, or the work upon which a person, in most but not all cases, relies for his or her livelihood and spends a major portion of his time.*" "Occupation" is found at 2 C.C.R. § 20714(a)(3): "*Occupation" means the employment in which one regularly engages or follows as the means of making a livelihood.*"

challenged regulations, is the telling deposition testimony of Maria Stewart, the Santa Monica City Clerk, who is the person who decides what "three words" a candidate is allowed to place beside his or her name on the Santa Monica election ballot to represent his or her "occupation or vocation".

Respondent Stewart stated in her deposition that she would accept the designation of "businessman" for an arms merchant, but that she would *reject* the more accurate and specific designation of "arms merchant", for example, because it would (in her opinion, and perhaps after "consulting with consultants"), be "politically unacceptable" in Santa Monica and might "be inflammatory to members of the public": "I would be concerned about safety on both sides. That if the circumstances were such as you state them, that members of the public would react to it in a violent manner." [Depo. of Stewart, pp. 64-65.]

Similarly a "hot dog stand vendor" would have a different impact on a voter than "businessman" or "restaurateur", and in fact the more general description, readily allowed by the City Clerk, informs the voter far *less* than the specific description, even though "informing the voter" is an explicit purpose of the regulations. *See* 2 C.C.R. § 20710(a).

It is undisputed that there is wide latitude in which descriptions to allow or disallow, as shown in the following deposition testimony by Maria Stewart, Santa Monica City Clerk, in which counsel tries to determine just how much discretion the City Clerk has with respect to the interpretation of the regulations:

> Q [By Mr. Fosbinder] So if somebody came to your office, dressed in a nice suit, and you happened to notice that they drove up in a nice Mercedes and they were very polite and they wanted to become a

candidate and they had the signatures and their proposed designation was businessman, isn't it true that normally you wouldn't even ask what they did for a living beyond businessman?

A No, that's not true.

Q So normally you would ask them what they did; is that right?

A Probably.

Q Okay. And if they said, "I am a real estate developer," would you then accept the ballot designation "businessman"?

THE WITNESS: It depends. Each circumstance with each potential candidate is different. When they come in, they come in with their ballot designation, their candidate statement. The whole thing fits together, and the whole thing is considered as one package. It is not just a consideration of the ballot designation by itself, isolated from all the other issues.

BY MR. FOSBINDER:

Q So you would say you had quite a bit of discretion then?

THE WITNESS: Yes.

BY MR. FOSBINDER:

Q Yes, you agree you have quite a bit of discretion?

A (No audible response.)

Q You're nodding.

A Yes, I am. I'm sorry. That's correct.

Although the decision about whether or not a candidate's ballot designation is allowed is at the discretion of the City Clerk, any ability to appeal the decision is essentially non-existent:

MR. FOSBINDER:

Q. Is there any process of appeal that a candidate has if you turn them down for their proposed ballot designation?

THE WITNESS: The candidate can give me an alternate designation.

BY MR. FOSBINDER:

Q Okay. Is that the only process of appeal, short of obviously going to court, as we have?

A As far as I know, I believe that is it.

> Q Okay. So in addition to agreeing that you have a lot of discretion, you agree that there is no process of appeal for your turning down a ballot designation?
>
> A There is no appeal that is set forth in the Elections Code to follow, no.

[Deposition of Stewart.]

Note that the regulations themselves are vague and overbroad in and of themselves, not just as they are interpreted by the Santa Monica City Clerk. Under the regulations, "homemaker", "child rearer", "mother" and "father" are *acceptable* designations, however "wife" and "husband" are *prohibited* designations. The latter are prohibited as "statuses" (defined as "a state, condition, social position or legal relation of the candidate to another person, persons, or the community"). 2 C.C.R. § 20714(a)(2), 20716(b)(3). Apparently one can not "work" at being a wife or husband, only as a mother or father. Similarly, pursuant to § 20716(j)(2), a member of the clergy may not "refer to their religious denomination", but on the other hand *may* define themselves as "rabbi" (surely Jewish), "priest" or "nun" (Catholic).

To say that the ballot designation is not important is simply unsupported by fact or law. Petitioner argues that the present ballot designation scheme obviously favors candidates who emerge from traditional backgrounds such as other elective offices or prestigious occupations and professions, and is disadvantageous for candidates who have what may be extremely popular positions or backgrounds but lack any prestigious occupation, profession or vocation, and Petitioner thereby makes an equal protection argument in this regard.

Einstein, for example, might find it more beneficial to both himself and to informing the voters to designate that he "developed theory relativity", rather than "patent clerk". Likewise, "Ex-President of the United States" (prohibited, incidentally, because of the prefix "-ex"), would surely be more informative and less misleading than the generic "attorney". The regulations are simply not neutral as they are written or as they are interpreted, and allow for unbridled discretion about important political speech.

CONCLUSION

Based on all of the foregoing, Petitioner respectfully submits that a grant of certiorari is appropriate in this important matter concerning election ballot speech.

Respectfully submitted,

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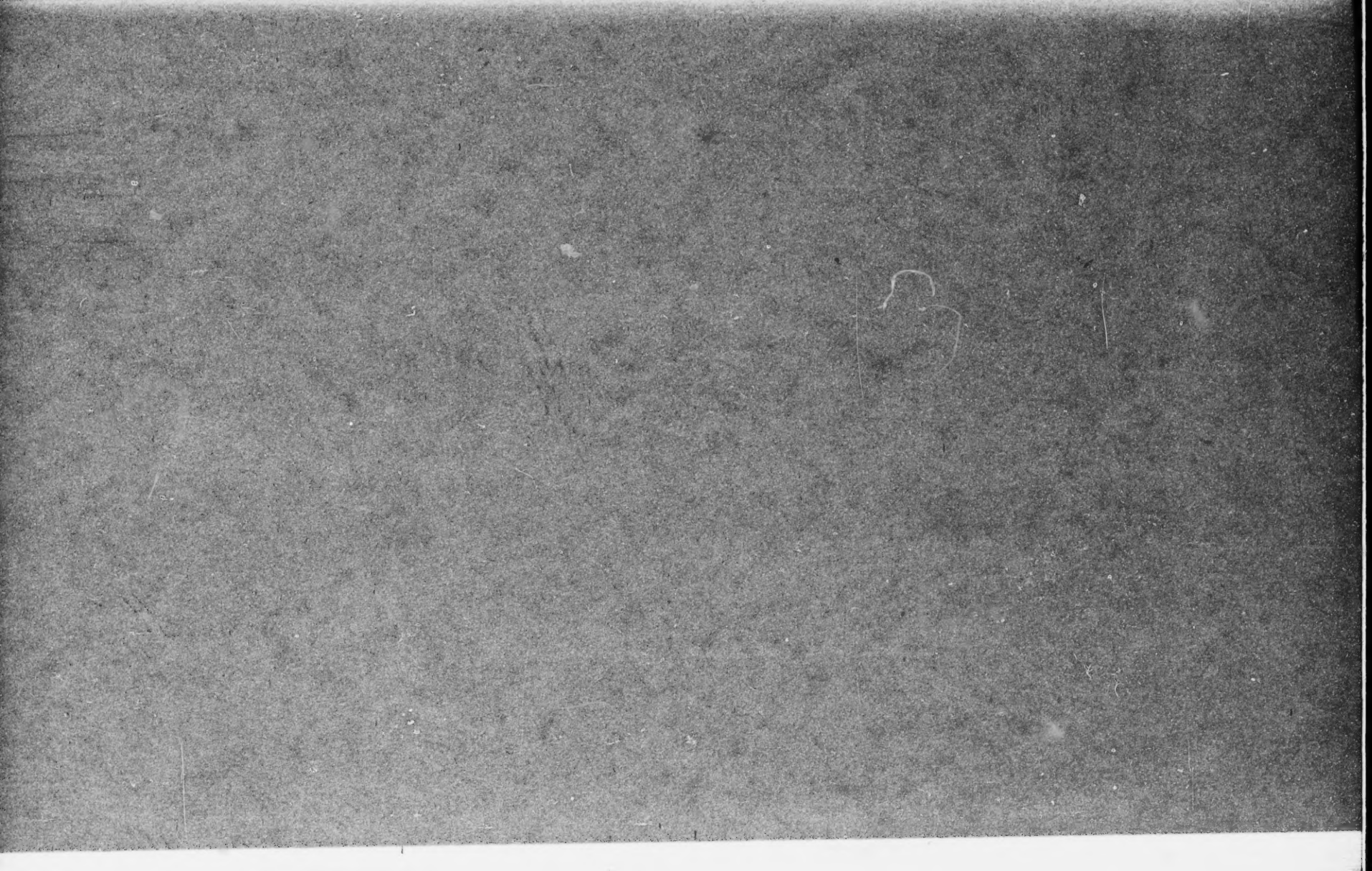

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED OCTOBER 17, 2002

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 01-56091

Jerry RUBIN,

Plaintiff-Appellant,

v.

CITY OF SANTA MONICA; Maria M. Stewart, City Clerk; Does 1-5, inclusive,

Defendants-Appellees,

Bill Jones, Secretary of State,

Defendant-Appellee.

Argued and Submitted June 6, 2002
Filed Oct. 17, 2002

Appeal from the United States District Court for the Central District of California, J. Spencer Letts, District Judge, Presiding, D.C. No. CV-00-09544-JSL.

Before HALL, SILVERMAN and RAWLINSON, Circuit Judges.

Appendix A

OPINION

SILVERMAN, Circuit Judge.

I. Overview

We are asked to decide whether the City of Santa Monica's refusal to permit a candidate for the City Council to designate his occupation as "peace activist" on the city election ballot violates the candidate's rights of free speech and equal protection. Because the ballot regulation prohibiting "status" designations is politically neutral and the City offers alternative channels of communication, we hold that the regulation does not severely burden a candidate's First Amendment rights. The City's interest in preserving the simplicity of its ballot is an important one, and the regulation is not unreasonable.

II. Factual Background

Jerry Rubin was qualified to run as a candidate for the Santa Monica City Council in the 2000 election. On August 11, 2000, Rubin hand-delivered his nomination papers for candidacy to the Santa Monica City Clerk, Maria Stewart. His filing included his "Candidate's Statement" and his optional ballot designation of "peace activist."

A Candidate's Statement is a statement of 200 words or less published by the City of Santa Monica and dispersed to voters at the City's expense, in which a candidate may describe his or her background, education, and qualification for the position sought.

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A "ballot designation" may take one of three forms under California Elections Code § 13107:

> (1) Words designating the elective city, county, district, state, or federal office which the candidate holds at the time of filing the nomination documents to which he or she was elected by vote of the people, or to which he or she was appointed, in the case of a superior or municipal court judge.
>
> (2) The word "incumbent" if the candidate is a candidate for the same office which he or she holds at the time of filing the nomination papers, and was elected to that office by a vote of the people, or, in the case of a superior or municipal court judge, was appointed to that office.
>
> (3) No more than three words designating either the current principal professions, vocations, or occupations of the candidate, or the principal professions, vocations, or occupations of the candidate during the calendar year immediately preceding the filing of nomination documents.

Cal. Elec. Code § 13107(a)(1)-(3).

The statute further mandates that "[n]either the Secretary of State nor any other election official shall accept a designation [that] . . . would mislead the voter." Cal. Elec. Code § 13107(b)(1).

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To implement these standards, the Secretary of State promulgated specific Ballot Designation Regulations. These regulations define "occupation" as

> the employment in which one regularly engages or follows as the means of making a livelihood. Examples of an acceptable designation of an "occupation" as defined in Elections Code § 13107, subdivision (a)(3), include, but are not limited to, "rancher," "restaurateur," "retail salesperson," "manual laborer," "construction worker," "computer manufacturing executive," "military pilot," "secretary" and "police officer."

2 Cal. Code Reg. § 20713(a)(3).

The Regulations further categorize certain designations as "unacceptable:"

> (a) The Secretary of State shall reject as unacceptable any proposed ballot designation which fails to comply with, or is otherwise inappropriate pursuant to, Elections Code § 13107, subdivision (a); is prohibited pursuant to Elections Code § 13107, subdivision (b); is misleading . . .
>
> (b) The following types of activities are distinguished from professions, vocations, and occupations and are not acceptable as ballot designations pursuant to Elections Code § 13107, subdivision (a)(3):

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. . .

> (3) Statuses: A status is a state, condition, social position, or legal relation of the candidate to another person, persons, or the community as a whole. A status is generic in nature and generally fails to identify with any particular specificity the manner by which the candidate earns his or her livelihood or spends the substantial majority of his or her time. Examples of a status include, but are not limited to, philanthropist, activist, patriot, taxpayer, concerned citizen, husband, wife, and the like.

2 Cal. Code Reg. § 20716.

Although the City of Santa Monica is not required to follow the State's regulations for its local elections, it chooses to do so. When City Clerk Maria Stewart accepted Rubin's nomination papers, she informed him that he could not designate himself a "peace activist" because the phrase constituted an impermissible "status" designation under California's election regulations. Stewart asked Rubin to supply her with an alternative ballot designation, but Rubin declined.

On September 7, 2000, Rubin filed a complaint in federal court against the City of Santa Monica, City Clerk Stewart, and Secretary of State Bill Jones, alleging both statutory and constitutional violations. He simultaneously filed a motion for a temporary restraining order (TRO) and a preliminary injunction to force the City of Santa Monica to accept his

"peace activist" ballot designation. Rubin's application for a TRO and motion for a preliminary injunction were both denied.

Secretary of State Bill Jones moved to dismiss the case against him on the grounds that the complaint failed to state a claim, that the court lacked jurisdiction, and that Rubin lacked standing. On January 17, 2001, the district court issued a Minute Order granting Jones' Motion to Dismiss. The court soon thereafter issued a written order granting Jones' motion and *sua sponte* issued an "Order to Show Cause Why Entire Case Should Not Be Dismissed" as respects the city defendants. After additional briefing, the district court issued its final order dismissing the case, holding that (1) the term "peace activist" is not a profession, occupation, or vocation as defined by the relevant regulations, and (2) the ballot designation restrictions do not impose severe burdens on Rubin's First Amendment rights, and that the restrictions are justified by the City's important regulatory interests. Although the Court noted that the City presented substantial evidence to the effect that Rubin did not earn his living as a "peace activist," it assumed for the purpose of its decision that he did.

III. Standard of Review

We review de novo the constitutionality of a state statute. *Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1054 (9th Cir. 2000).

We also review de novo the dismissal of a party under Federal Rule of Civil Procedure 12(b)(6). *Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001). When

reviewing a 12(b)(6) dismissal, the facts set forth in a plaintiff's complaint are to be interpreted liberally and taken as true for the purpose of determining whether or not a basis for the plaintiff's complaint exists. *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984). A dismissal may be affirmed on any proper ground, even if the district court did not reach the issue or relied on different grounds or reasoning. *Oscar v. Univ. Students Co-op. Ass'n*, 965 F.2d 783, 785 (9th Cir. 1992).

IV. Jurisdiction and Mootness

We have jurisdiction over the district court's final order of dismissal pursuant to 28 U.S.C. § 1291.

The City of Santa Monica argues that, because the November 7, 2000 election "has long since come and gone," the issues Rubin raises on appeal are moot. Generally, a case is rendered moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Schaefer v. Townsend*, 215 F.3d 1031, 1033 (9th Cir. 2000) (citations omitted). However, a court is not precluded from exercising jurisdiction over an otherwise moot case where, as here, the case is "capable of repetition, yet evading review." *Id.*

Although the City of Santa Monica's 2000 election has passed, Rubin's claims are capable of repetition because future city election overseers would deny him the ability to use the designation "peace activist" on the ballot. "The short span of time between the filing deadline and the election makes such a challenge evasive of review." *Id.* (candidate's claim that residency requirements denied him the right

to file a declaration of candidacy not rendered moot upon passing of election). As we have previously noted, "[i]f [election law] cases were rendered moot by the occurrence of an election, many constitutionally suspect laws . . . could never reach appellate review." *Id.* (quoting *Joyner v. Mofford*, 706 F.2d 1523, 1527 (9th Cir. 1983)) (alteration in the original). We accordingly exercise jurisdiction over Rubin's appeal.

V. Analysis

A. California Elections Code § 13107(a) and 2 California Code of Regulations § 20716 do not violate Rubin's freedom of speech.

1. Election Regulation and the First Amendment

Rubin contends that, because California Elections Code § 13107 and 2 California Code of Regulations § 20716 prevent him from designating himself a "peace activist" on the election ballot, the laws violate his freedom of speech and are unconstitutional both facially and as applied to him.

Rubin and the City of Santa Monica analyze this case under the public forum principles announced in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983). Rubin argues that a ballot is a limited public forum requiring strict scrutiny, while the City says that a ballot is a non-public forum requiring only rational basis review. As we see it, the issue is not whether a ballot is some sort of public forum, but whether, applying Supreme Court election law, California's ballot regulations

constitute "severe burdens" on free speech rights. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997).

In election regulation cases, the Supreme Court developed a balancing test to resolve the tension between a candidate's First Amendment rights and the state's interest in preserving the fairness and integrity of the voting process. When deciding whether a state election law violates First and Fourteenth Amendment speech rights, courts are to "weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary." *Id.* (*quoting Burdick v. Takushi*, 504 U.S. 428, 434, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992)) (citations and internal quotations omitted). "Regulations imposing severe 11 burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's 'important regulatory interests' will usually be enough to justify reasonable, nondiscriminatory restrictions." *Id.* (citations omitted). The cases reiterate that "[n]o bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms," and that courts are required to make "hard judgments" given the interests involved. *Id.*

2. The election regulations do not impose a severe burden on Rubin's right of free speech.

There is little question but that Rubin's speech is burdened by the restriction placed on how he may designate his occupation on the ballot. It is the severity of that burden,

however, that determines the standard of review by which we judge the state's interest and, accordingly, decide whether the restriction is unconstitutional. *See id.*

Courts will uphold as "not severe" restrictions that are generally applicable, even-handed, politically neutral, and which protect the reliability and integrity of the election process. *See Hussey v. City of Portland*, 64 F.3d 1260, 1265 (9th Cir. 1995). This is true even when the regulations "have the effect of channeling expressive activities at the polls." *Timmons*, 520 U.S. at 369, 117 S. Ct. 1364 (upholding city's "anti-fusion law" prohibiting candidates from appearing as the candidate of more than one party on the ballot) (citation omitted). *See also Burdick*, 504 U.S. at 438, 112 S. Ct. 2059 (upholding prohibition of write-in votes on election day where it was otherwise easy for candidates to appear on the ballots). Recognizing that "there must be a substantial regulation of elections if they are to be fair and honest," *Storer v. Brown*, 415 U.S. 724, 730, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974), the Supreme Court recently noted the propriety of "requirements as to procedure and safeguards which experience shows are necessary to ensure the fundamental right involved." *Cook v. Gralike*, 531 U.S. 510, 524, 121 S. Ct. 1029, 149 L. Ed. 2d 44 (2001) (citation omitted).

A restriction is particularly unlikely to be considered severe when a candidate is given other means of disseminating the desired information. In *Timmons*, for example, the United States Supreme Court upheld a law prohibiting candidates from listing more than one party affiliation on the ballot, in part because the party retained great latitude in its ability to communicate its support for

that candidate notwithstanding the minor ballot prohibition. *Timmons*, 520 U.S. at 363, 117 S. Ct. 1364. In *Burdick*, the Supreme Court upheld a Hawaii law prohibiting voters from writing in names of candidates on election day, citing as justification the ease of access candidates otherwise have to Hawaii's ballots. *Burdick*, 504 U.S. at 436-437, 112 S. Ct. 2059 (1992). Similarly, in *Schrader v. Blackwell*, the Sixth Circuit upheld the constitutionality of a regulation that prohibited unrecognized party designations, such as "Libertarian," because reasonable means existed for a party to become recognized. *Schrader*, 241 F.3d 783 (6th Cir. 2001).

Courts will strike down state election laws as severe speech restrictions only when they significantly impair access to the ballot, stifle core political speech, or dictate electoral outcomes. For example, *Cook*, 531 U.S. at 510, 121 S. Ct. 1029, overturned a law requiring ballots to contain notations describing whether or not the candidate supports term limits, holding that it punishes candidates on the basis of core political speech and dictates electoral outcomes. *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999), similarly overturned a requirement that petition circulators wear badges and publish identifying information, because the regulation hinders core political speech. In *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989), the United States Supreme Court struck a regulation prohibiting official governing bodies of political parties from giving endorsements to candidates, holding that the law burdened core political speech. Likewise, in *Rosen v. Brown*, 970 F.2d 169 (6th Cir.

1992), the Sixth Circuit invalidated a regulation prohibiting the political party designation of "Independent" while permitting "Republican" or "Democrat" designations, holding that party labels designate the views of party candidates and the regulations therefore hinder "core political speech."

Applying these principles to the case at hand, we hold that the City of Santa Monica's prohibition of status designations such as "activist" does not severely burden a candidate's First Amendment rights.

First, the regulation is viewpoint neutral. Any use of the term "activist" is banned from the ballot whether used alone or with any additional description. Peace activists and defense activists are treated the same. So are Right to Life Activists and Pro-Choice Activists. The City's viewpoint neutrality distinguishes the case before us from *Rosen*, in which the Sixth Circuit held that prohibiting the designation "Independent" was unconstitutional where the regulations allowed for other political party designations. *Rosen*, 970 F.2d at 176-77. As the *Schrader* court noted, "party labels provide a shorthand designation of the views of party candidates on matters of public concern." *Schrader*, 241 F.3d at 789. The regulation therefore affects core political speech.

Second, even though the regulation prevents Rubin from communicating his status as a peace activist on the ballot, it does not infringe on "core political speech," or favor one type of political speech over another. The regulation does not prevent Rubin from supporting or discussing political issues, it merely limits how he may describe his occupation

on the ballot. In this way, the California law stands in stark contrast to the statute in *Cook*. In *Cook*, the Supreme Court struck down a Missouri law requiring "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" to be placed on the ballot next to the names of certain candidates. *Cook*, 531 U.S. at 514-15, 121 S. Ct. 1029.

Third, the City of Santa Monica's regulations provide Rubin with an ample channel for communicating his peace activities to the public. California Elections Code § 13307 allows the candidate to submit a "Candidate's Statement," in which the candidate may describe his background, education, and qualifications in up to 200 words. The Statements are published by the City, at the City's expense, in a Voter Information Pamphlet and distributed prior to the election to all registered voters within Santa Monica. Rubin does not deny that he could have used those 200 words to describe his peace activism to the public at the city's expense. This device greatly decreases the burden imposed by the ballot restriction. *See, e.g., Timmons*, 520 U.S. at 362-63, 117 S. Ct. 1364 (upholding law prohibiting candidates from listing more than one party affiliation on the ballot, in part, because the party retains great latitude in its ability to communicate its support for that candidate notwithstanding the minor ballot prohibition).

Rubin argues that the Candidate's Statement does not cure the problem caused by the ballot restriction because the "ballot designation is the last thing they see as they punch their ballots." *See Anderson v. Martin*, 375 U.S. 399, 402, 84 S. Ct. 454, 11 L. Ed. 2d 430 (1964). While there is no

denying the importance of a ballot, the Supreme Court has recognized that "[b]allots serve primarily to elect candidates, not as forums for political expression." *Timmons*, 520 U.S. at 363, 117 S. Ct. 1364. A ballot is a ballot, not a bumper sticker. Cities and states have a legitimate interest in assuring that the purpose of a ballot is not "transform[ed] . . . from a means of choosing candidates to a billboard for political advertising." *Id.* at 365, 117 S. Ct. 1364.

Finally, Rubin emphasizes that City officials are given great discretion in determining what is an "occupation." Far from being "unbridled," City of Santa Monica election officials are required to follow the comprehensive set of regulations contained in 2 California Code of Regulations § 20716 et seq., as to what constitutes acceptable ballot designations. Moreover, Rubin has not demonstrated that the officials use what discretion they do have in a manner that burdens his speech any more than do the regulations themselves, for example, by using their discretion to favor particular viewpoints or politics.

This is not a case where the right to vote or access to the ballot is at issue. This is not a case where the regulation permits certain types of political speech but prohibits others. The only issue is whether a "status" may be designated in the same manner as an "occupation." The California laws at issue here are much less intrusive than restrictions upheld by our sister circuits. *See, e.g., McLaughlin v. North Carolina Bd. of Elections*, 65 F.3d 1215 (4th Cir. 1995) (upholding as constitutional North Carolina's requirement that a candidate of a new political party gather certain support in the general election for that party to remain on the ballot); *Dart v. Brown*,

717 F.2d 1491 (5th Cir. 1983) (upholding as constitutional regulation which permitted the political party affiliation of recognized party candidates to be printed on the ballot, but required the space be left blank for candidates not affiliated with recognized political parties); *Schrader v. Blackwell*, 241 F.3d 783 (6th Cir. 2001) (same); *Rainbow Coalition v. Oklahoma State Election Bd.*, 844 F.2d 740 (10th Cir. 1988) (finding constitutional Oklahoma's election scheme that authorizes candidates of recognized parties to be automatically identified on the ballot, but requires unrecognized parties to file petitions bearing 5% of total votes cast in last election before allowing party designation); *Libertarian Party v. Florida*, 710 F.2d 790 (11th Cir. 1983) (upholding as constitutional an election law under which a minor political party may not run a candidate in a local election without satisfying 3% petition requirement).

Accordingly, we hold that the burden imposed by California Elections Code § 13107(a) and 2 California Code of Regulations § 20716 on Rubin's free speech right is not "severe." We therefore apply a "less exacting" standard of review to the regulations at issue. *Timmons*, 520 U.S. at 358, 117 S. Ct. 1364. That less exacting standard requires us now to turn to whether the interest the City seeks to advance by its ballot designation rules is "important" and whether the restriction is "reasonable" and "non-discriminatory." *Anderson v. Celebrezze*, 460 U.S. 780, 788, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983).

3. The City of Santa Monica has a sufficiently important regulatory interest in preventing misrepresentation and reducing voter confusion by regulating the ballot designations.

"[S]tates have significant authority to regulate . . . the identification of candidates on the ballot." *Schrader*, 241 F.3d at 790 (citations omitted). Historically, a state's interest in preventing confusion, deception, and frustration in the general election process has been regarded as an "important state interest." *See, e.g., Timmons*, 520 U.S. at 364, 117 S. Ct. 1364; *Eu*, 489 U.S. at 226, 109 S. Ct. 1013; *Jenness v. Fortson*, 403 U.S. 431, 442, 91 S. Ct. 1970, 29 L. Ed. 2d 554 (1971).

Because "the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions," *Anderson*, 460 U.S. at 788, 103 S. Ct. 1564, a party challenging such a regulation bears a "heavy constitutional burden." *Schrader*, 241 F.3d at 790-91. A primary purpose of the California Election Code "is to insure the accurate designation of the candidate upon the ballot in order that an informed electorate may intelligently elect one of the candidates." *Salinger v. Jordan*, 61 Cal.2d 824, 826, 40 Cal. Rptr. 361, 395 P.2d 49 (1964). The specific provision at hand, California Elections Code § 13107(b)(1), prohibiting designations that "would mislead the voter," "seeks to prevent 'creative' misuse of ballot designations by candidates." *Andrews v. Valdez*, 40 Cal. App. 4th 492, 494, 46 Cal. Rptr. 2d 744 (1995) (citation omitted). To this end, the City of Santa Monica has limited the ballot designation to one of three topics: the office the candidate currently holds,

a statement of incumbency if the candidate holds the same office, or a short, relatively generic, non-partisan, non-political three word statement of the candidate's profession, occupation, or vocation. These nondiscriminatory regulations are reasonably related to the legitimate goal of achieving a straightforward, neutral, non-confusing ballot.

Rubin argues that, even if the regulation is facially constitutional, it is unconstitutional as applied to him because his "occupation," as that term is defined in the regulation, is "peace activist," and he would therefore not deceive or mislead voters by using the phrase.

First, we reject Rubin's premise that a factual finding that he spends the majority of his workday and makes money in activities that can be described as those of an "activist" compels the conclusion that his "occupation" is that of a "peace activist" for election purposes. By definition, "activist" is a "status" rather than an "occupation." 2 Cal. Code Reg. § 20716(b). A "status" is defined as "a state, condition, social position or legal relation of the candidate to another person, persons, or the community as a whole." *Id.* The regulation prohibits "status" designations because "a status is generic in nature and generally fails to identify with any particular specificity the manner by which the candidate earns his or her livelihood or spends the substantial majority of his or her time." *Id.* The word "activist" is specifically listed as an example of an impermissible status designation. *Id.* Thus, even if a person were to spend the substantial majority of his or her time promoting peace, the designation "peace activist" would still be improper because it is "generic," and "generally fails to identify with any

particular specificity the manner" in which the candidate spends his time. *Cf. Luke v. Superior Court*, 199 Cal. App. 3d 1360, 245 Cal. Rptr. 594 (1988) (holding that a Commissioner who spent the majority of her time serving as a judge pro tempore could not list her occupation as "Judge—Los Angeles County (Acting)" because the designation would mislead voters).

Second, we believe that Rubin has misapprehended the import of California's judgment that the term "activist" is inappropriate as a designation of an occupation. As the discussion of the "generic" nature of a status designation indicates, the regulations do not reflect the judgment that a person can never spend the substantial majority of his time or earn a livelihood in activities that can be described as those of an activist. Rather, it is misleading in the sense that it provides too little information and permits the electorate to engage in too varied a set of inferences, many of which will inevitably be inaccurate. In this connection, we note that the term "activist" does not designate a well-defined set of activities or how such activities relate specifically to making a livelihood. Instead, terms such as "peace activist" highlight a candidate's connection to a state, idea, or social position which is difficult to verify and could be manipulated by the candidate to foster a favorable image. Moreover, adding the word "peace" to the word "activist" does nothing to remedy these concerns although it makes the designation superficially somewhat more specific. Quite the opposite: while it does nothing to specify how Rubin's status as an "activist" relates to his time or earning a living, it connects his name to an idea which is popular but which can be used to describe a wide range of ideologies.

Finally, Santa Monica has an additional important regulatory interest in predictable and administrable election rules that must be weighed against the burden to Rubin. Even assuming that the term "activist" is not always misleading as a description of an occupation, determining when this might be the case would require nuanced judgments about the way that the term is generally understood by the public as well as the types of circumstances in which it may fairly be said that a candidate makes a living as an activist rather than doing some other possibly related activity such as selling items displaying political slogans. The regulations exist to provide guidance in determining what qualifies for an occupation and limit the discretion of election officials by providing relatively concrete standards. Rubin would have election officials use their discretion to essentially ignore this guidance where they could make a judgment that the term actually is not misleading considering the totality of the circumstances. Asking election officials to make such open-ended and ultimately subjective determinations would inevitably introduce additional uncertainty and bias into the approval process as well as invite additional judicial intervention. *Cf. Luke*, 199 Cal. App. 3d at 1363, 245 Cal. Rptr. 594.

The City of Santa Monica gave Rubin the option to provide voters with another, less generic term to describe his occupation on the ballot, but Rubin declined. We agree with the district court that Santa Monica may apply the California Election Code and accompanying regulations to prevent Rubin from using the designation "peace activist" on the ballot, even if Rubin spends the majority of his time in peace activism.

In summary, we hold that Santa Monica's regulations further an important governmental interest, that they are non-discriminatory, are viewpoint-neutral, and that they do not severely limit a candidate's First Amendment rights. Therefore, they are not unconstitutional on their face or as applied.

B. The election regulations do not violate Rubin's right of Equal Protection.

Rubin argues that the election regulations violate his right to Equal Protection, because they are biased toward current office holders and those with prominent positions with respect to the right to free speech.

In election cases, free speech and equal protection analyses generally work in tandem. An election restriction is subject to heightened scrutiny on Equal Protection grounds only if it burdens a suspect class or a fundamental right. *See San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 17, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973). Neither "non-incumbents" nor "peace activists" is a suspect class. Therefore, rational basis review is appropriate unless the restriction unconstitutionally burdens a fundamental right, here, the right to free speech. Because we conclude that the restrictions do not unconstitutionally burden Rubin's right of free speech, we find that neither do they violate his Equal Protection right.

C. The district court correctly dismissed Defendant Secretary of State Bill Jones.

Finally, Rubin claims that the district court erred in dismissing California Secretary of State Bill Jones from the lawsuit for lack of standing.

To have a justiciable claim, a litigant must meet three constitutional standing requirements: (1) he must have directly suffered an injury in fact, (2) the injury must be fairly traceable to the defendant's conduct, and (3) a favorable court decision must be likely to redress the injury. *See, e.g., Northeastern Florida Contractors v. Jacksonville*, 508 U.S. 656, 663, 113 S. Ct. 2297, 124 L. Ed. 2d 586 (1993).

Rubin initially argues that he has standing to sue California's Secretary of State because the City would not have voluntarily chosen to exclude "peace activist" from the ballot had the State's election regulations not existed. The problem is that he cannot establish that Bill Jones caused the injury, or that enjoining the Secretary of State from enforcing the election regulations would stop the City of Santa Monica from following them in the future. The City of Santa Monica is not required to follow California's election regulations. To the contrary, under California Code of Regs. tit. 2, § 20710(e), the California State election regulation Rubin challenges is expressly inapplicable to municipal elections. Because Secretary of State Jones neither required nor encouraged the City of Santa Monica to follow the guidelines, Rubin cannot establish that his conduct *caused* the constitutional injury he claims.

Moreover, Rubin cannot establish redressability: even if the Court were to enjoin Jones from enforcing the state regulations in state elections, that injunction would have no effect on their use in local elections. Just as the City of Santa Monica voluntarily chose to adopt the State's regulations for its elections, so could it choose to follow the guidelines even if the State no longer adhered to them. A "purely speculative" favorable outcome will not suffice to establish the redressability prong. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 618, 93 S. Ct. 1146, 35 L. Ed. 2d 536 (1973) (finding no standing based on lack of redressability because the prospect that prosecuting deadbeat dads would result in payment of child support was only speculative).

Rubin next argues that he has standing to challenge the state election law because, as a voter and a citizen, his right to receive desired information about candidates is impaired by the regulation. This theory fails to establish an injury sufficient to establish standing. The Supreme Court has described the injury requirement for standing as an "injury in fact" that is "distinct and palpable," and not "hypothetical" or "abstract." *See Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984). To establish standing, however, the injury must be more than a generalized grievance common to all members of the public. *See Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216-27, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1974). Alleging simply that "as a voter and a citizen" he should be able to hear whatever three words a candidate wishes to say about himself or herself, Rubin has alleged no more than an abstract interest common to all members of the public. Thus, Rubin cannot establish standing on that ground.

VI. Conclusion

For the foregoing reasons, the judgment of the district court is AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DATED AND FILED JUNE 18, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 00-9544 JSL

JERRY RUBIN,

Plaintiff,

v.

CITY OF SANTA MONICA, ET AL.,

Defendants.

ORDER DISMISSING CASE PURSUANT TO ORDER TO SHOW CAUSE

On January 25, 2001, the Court issued an order to show cause ("OSC") why the September 12, 2000 Order Denying Plaintiff's *Ex Parte* Application for a Temporary Restraining Order ("September 12 Order"), which was incorporated by reference in the September 13, 2000 Order Denying Plaintiff's Motion for a Preliminary Injunction, did not resolve all of the issues in this case and, therefore, why this case should not be dismissed in its entirety. On February 5, 2001, Plaintiff filed his response to the OSC. On February 12, 2001, Defendants filed their reply brief.

Appendix B

Having reviewed the papers filed in connection with this matter and being fully apprised of the relevant facts and law, the Court finds that Plaintiff has failed to show cause why this case should not be dismissed. There are no facts that could be developed that would alter the Court's determination of the legal issues in this case. The so-called "new facts" outlined by Plaintiff in his opposition brief, are not new, but were known to and considered by the Court in connection with the motion for preliminary injunction.

FACTUAL BACKGROUND

Plaintiff Jerry Rubin was a qualified candidate for the November 2000 election to the Santa Monica City Council. In connection with his candidacy, Plaintiff submitted his nomination papers to the Santa Monica City Clerk, Defendant Maria M. Stewart. His filing included a candidate's statement and a ballot designation of "peace activist."

Ballot designations are governed by California Elections Code § 13107(a), which permits political candidates to submit "[n]o more than three words designating either the current principal professions, vocations, or occupations of the candidate, or the principal professions, vocations, or occupations of the candidate during the [preceding] calendar year . . . ." Section 13107(b) further provides that no ballot designation shall be accepted if, *inter alia*, "[I]t would mislead the voter."

The California Supreme Court has noted that "[a] major purport of the Elections Code is to insure that accurate designation of the candidate upon the ballot in order that

an informed electorate may intelligently elect one of the candidates." *Salinger v. Jordan*, 61 Cal.2d 824, 826, 40 Cal. Rptr. 361 (1964). Section 13107 is intended to protect voters from misleading designations and prevent creative misuse of ballot designations by candidates. *Andrews v. Valdez*, 40 Cal. App. 4th 492, 494, 46 Cal. Rptr. 2d 744 (1995). The regulations accompanying Section 13107 distinguish acceptable designations of professions, vocations, or occupations from unacceptable designations of avocations or statuses. The regulations cite "activist" as an example of a "status" that is not an appropriate ballot designation. 2 California Code of Regulations § 20716. Although the statute and regulations are not mandatory for elections not certified by the Secretary of State of the State of California, 2 California Code of Regulations § 20710 (e), the City of Santa Monica has adopted them by ordinance.

ANALYSIS

Plaintiff argues that Defendants City of Santa Monica and Maria M. Stewart, City Clerk, acted unconstitutionally in refusing to approve "peace activist" as his ballot designation.[1] As set forth more fully in the September 12 Order, Defendants properly applied Section 13107 in rejecting Plaintiff's ballot designation because "peace

1. Defendants have presented substantial evidence showing that, even if "peace activist" was an acceptable ballot designation, it is not, in fact, Plaintiff's *principal* occupation. Although Defendants' evidence is highly persuasive, the Court assumes for purposes of decision that Plaintiff does, in fact, earn his living as a peace activist.

activist" is a status, not a profession, occupation or vocation, as those terms are defined in the relevant regulations.[2]

Plaintiff also argues that, regardless of whether Section 13107 was properly applied, it is unconstitutional because it so limits his choice of words for the ballot designation that it violates his First and Fourteenth Amendment rights to free speech and equal protection of the laws. Plaintiff's arguments fail as a matter of law.

The Supreme Court has recognized that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Storer v. Brown*, 415 U.S. 724, 730, 94 S. Ct. 1274, 1279 (1974); *Tashjian Republican Party of Conn.*, 479 U.S. 208, 217, 107 S. Ct. 544, 549-550 (1986); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S. Ct. 1364, 1369 (1997). In evaluating the constitutionality of particular election regulations, the court must "weigh the '"character and magnitude"' of the burden the State's rule imposes on those

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2. Plaintiff also argues that the City acted unconstitutionally because it is "'making up' its own rules and policies, without any formal, written basis for its own decisions, changing the underlying analysis." Plaintiff's Response to OSC at 2:23-3:1. Plaintiff's arguments are without merit. It is undisputed that the City has adopted the state election laws and regulations by ordinance. Regardless of the various explanations for specifically how the propriety of Plaintiff's ballot designation was decided, it is clear that those laws were properly applied in this case. Plaintiff's ballot designation of "peace activist" was undoubtedly improper under the governing statute and regulations.

rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. [Citations.] Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's "'important regulatory interests'" will usually be enough to justify "'reasonable, nondiscriminatory restrictions.'" *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S. Ct. 1364, 1370. There is no bright-line rule separating permissible regulations from unconstitutional infringements on First Amendment rights. *Id.*

Here, the applicable regulations clearly do not impose severe burdens on Plaintiff's First Amendment rights. The ballot designation, as defined, is limited to a three word statement of the candidate's profession, vocation or occupation. By its very nature, it is a narrow, restricted forum. It is not intended to be a platform for political speech. The more lengthy candidate's statement, wherein a candidate can more fully express his political views, has been created for such a purpose. Limitations on what can be included in the three word ballot designation, almost by definition, impose a minimal burden on speech.

Because Defendants have "important regulatory interests" in closely regulating the ballot designation, the "reasonable, nondiscriminatory restrictions" imposed are constitutional. The California Supreme Court has noted that one of the purposes of this portion of the Election Code "is to insure the accurate designation of the candidate upon the ballot in order that an informed electorate may

intelligently elect one of the candidates." *Salinger v. Jordan*, 61 Cal.2d 824, 826, 40 Cal. Rptr. 361, 395 (1964). In furtherance of this purpose, the ballot designation has been limited to a short, relatively generic, non-partisan, non-political three word statement of the candidate's profession, occupation or vocation. Defendants have an important regulatory interest in maintaining the integrity of the election process and avoiding voter confusion by providing a straightforward, neutral ballot. These interests are furthered by the reasonable, nondiscriminatory restrictions imposed on the ballot designation and support a general policy of maintaining the integrity of the ballot. The restrictions are reasonable because the three word ballot designation is so short as to afford little opportunity for expression and because the candidate's statement allows for more detailed presentation of a candidate's political platform. The restrictions are nondiscriminatory because they apply equally to all classes of persons and Plaintiff has made no showing that they have been applied in a discriminatory fashion.

Plaintiff's Fourteenth Amendment claim also fails for the same reason that his First Amendment claim fails. The restrictions at issue are not subject to heightened scrutiny because Plaintiff cannot show that they burden a suspect class or a fundamental right. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 17, 93 S. Ct. 1278, 1288 (1973); *N.A.A.C.P., Los Angeles Branch v. Jones*, 131 F.3d 1317, 1321 (9th Cir. 1997). "Without heightened scrutiny, a distinction need be only rationally related to a legitimate purpose." *N.A.A.C.P., Los Angeles Branch, supra.* The restrictions easily survive such minimal scrutiny for the same

reasons that Defendants' "important regulatory interests" justify "reasonable, nondiscriminatory restrictions" on speech.

ORDER

Based on all the foregoing, Plaintiff has failed to show cause why his case should not be dismissed. Accordingly, IT IS HEREBY ORDERED that this case be DISMISSED in its entirety.

IT IS SO ORDERED.

DATED: 6/18/01

s/ J. Spencer Letts
J. Spencer Letts
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED NOVEMBER 22, 2002

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-56091

D.C. No. CV-00-09544-JSL
Central District of California, Los Angeles

JERRY RUBIN,

Plaintiff - Appellant,

v.

CITY OF SANTA MONICA, et al.,

Defendants - Appellees,

BILL JONES, Secretary of State,

Defendant-Appellee.

Appendix C

ORDER

Before: HALL, SILVERMAN and RAWLINSON, Circuit Judges.

A sua sponte request for an en banc vote has been received. Therefore, within twenty-one days from the filed date of this order, the parties shall file simultaneous briefs, not exceeding fifteen pages, setting forth their respective positions on whether the case should be reheard en banc. Fifty copies should be filed.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED FEBRUARY 4, 2003

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-56091

D.C. No. CV-00-09544-JSL
Central District of California, Los Angeles

JERRY RUBIN,

Plaintiff - Appellant,

v.

CITY OF SANTA MONICA, et al.,

Defendants - Appellees,

BILL JONES, Secretary of State,

Defendant-Appellee.

Appendix D

ORDER

Before: HALL, SILVERMAN and RAWLINSON, Circuit Judges.

An active judge *sua sponte* called for rehearing en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35(b).

The *sua sponte* call for rehearing en banc is rejected.

APPENDIX E — CALIFORNIA ELECTIONS CODE § 13107

DEERING'S CALIFORNIA CODES ANNOTATED

ELECTIONS CODE
DIVISION 13. Ballots, Sample Ballots, and Voter Pamphlets
CHAPTER 2. Forms of Ballots: Ballot Order

Cal Elec Code § 13107 (2000)

§ 13107. Designations that may appear under name of each candidate

(a) With the exception of candidates for Justice of the State Supreme Court or court of appeal, immediately under the name of each candidate, and not separated from the name by any line, may appear at the option of the candidate only one of the following designations:

(1) Words designating the elective city, county, district, state, or federal office which the candidate holds at the time of filing the nomination documents to which he or she was elected by vote of the people, or to which he or she was appointed, in the case of a superior court judge.

(2) The word "incumbent" if the candidate is a candidate for the same office which he or she holds at the time of filing the nomination papers, and was elected to that office by a vote of the people, or, in the case of a superior court judge, was appointed to that office.

(3) No more than three words designating either the current principal professions, vocations, or occupations of the candidate, or the principal professions, vocations, or occupations of the candidate during the calendar year immediately preceding the filing of nomination documents. For purposes of this section, all California geographical names shall be considered to be one word. Hyphenated words that appear in any generally available standard reference dictionary, published in the United States at any time within the 10 calendar years immediately preceding the election for which the words are counted, shall be considered as one word. Each part of all other hyphenated words shall be counted as a separate word.

(4) The phrase "appointed incumbent" if the candidate holds an office other than a judicial office by virtue of appointment, and the candidate is a candidate for election to the same office, or, if the candidate is a candidate for election to the same office or to some other office, the word "appointed" and the title of the office. In either instance, the candidate may not use the unmodified word "incumbent" or any words designating the office unmodified by the word "appointed." However, the phrase "appointed incumbent" shall not be required of a candidate who seeks reelection to an office which he or she holds

and to which he or she was appointed, as a nominated candidate, in lieu of an election, pursuant to Sections 5326 and 5328 of the Education Code or Section 7228, 7423, 7673, 10229, or 10515 of this code.

(b) Neither the Secretary of State nor any other election official shall accept a designation of which any of the following would be true:

(1) It would mislead the voter.

(2) It would suggest an evaluation of a candidate, such as outstanding, leading, expert, virtuous, or eminent.

(3) It abbreviates the word "retired" or places it following any word or words which it modifies.

(4) It uses a word or prefix, such as "former" or "ex-," which means a prior status. The only exception is the use of the word "retired."

(5) It uses the name of any political party, whether or not it has qualified for the ballot.

(6) It uses a word or words referring to a racial, religious, or ethnic group.

(7) It refers to any activity prohibited by law.

(c) If, upon checking the nomination documents, the election official finds the designation to be in violation of any of the restrictions set forth in this section, the election official shall notify the candidate by registered or certified mail return receipt requested, addressed to the mailing address appearing on the candidate's nomination documents.

(1) The candidate shall, within three days from the date of receipt of the notice, appear before the election officer or, in the case of the Secretary of State, notify the Secretary of State by telephone, and provide an alternate designation.

(2) In the event the candidate fails to provide an alternate designation, no designation shall appear after the candidate's name.

(d) No designation given by a candidate shall be changed by the candidate after the final date for filing nomination documents, except as specifically requested by the elections official as specified in subdivision (c) or as provided in subdivision (e).

(e) The designation shall remain the same for all purposes of both primary and general elections, unless the candidate, at least 98 days prior to the general election, requests in writing a different designation which the candidate is entitled to use at the time of the request.

(f) In all cases, words so used shall be printed in 8-point roman uppercase and lowercase type except that, if the designation selected is so long that it would conflict with the space requirements of Sections 13207 and 13211, the elections official shall use a type size for the designation for each candidate for that office sufficiently smaller to meet these requirements.

(g) Whenever a foreign language translation of a candidate's designation is required under the Voting Rights Act of 1965 (42 U.S.C.A. Sec. 1971), as amended, to appear on the ballot in addition to the English language version, it shall be as short as possible, as consistent as is practicable with this section, and shall employ abbreviations and initials wherever possible in order to avoid undue length.

APPENDIX F — SECRETARY OF STATE BALLOT DESIGNATION REGULATIONS

SECRETARY OF STATE BALLOT DESIGNATION REGULATIONS

Note: Although § 20710(e) exempts cities from these regulations, in the absence of other guidelines, city election officials may wish to follow the Secretary of State Ballot Designation Regulations set forth in the California Administrative Code, Chapter 7 (commencing with § 20710.)

Chapter 7. Ballot Designations

§ 20710. General Provisions.

(a) The regulatory purpose of this Chapter is to ensure the accurate designation of the candidate upon the ballot in order that an informed electorate may intelligently elect one of the candidates.

(b) The Secretary of State shall, at all times, apply and interpret the provisions of Elections Code § 13107 and the regulations included in this Chapter in a manner consistent with the regulatory purpose of this Chapter.

(c) Candidates are not required to use a ballot designation pursuant to Elections Code § 13107, subdivision (a), and may opt to leave the space for such a designation on the ballot blank. In order to notify the elections official as to whether he or she will use a ballot designation or will opt to leave the ballot designation space blank, the candidate must initial the appropriate

box on the Declaration of Candidacy or otherwise so indicate on the Declaration of Candidacy.

(d) Pursuant to Elections Code § 13107, subdivision (a), a candidate may submit a proposed ballot designation pursuant to any one of the four provisions specified in Elections Code § 13107, subdivision (a), subparts (1) through (4), applicable to that candidate. The candidate shall be free to select from which of the applicable four subparts he or she is submitting his or her proposed ballot designation.

(e) The regulations set forth in this Chapter shall apply only to elections held for offices for which elections returns are certified by the Secretary of State of the State of California.

(f) Whenever, the word "should" is used in this Chapter, it is recommended, not mandatory.

Appendix F

§ 20711. Ballot Designation Worksheet.

(a) In order to facilitate review of a candidate's proposed ballot designation by the Secretary of State pursuant to Elections Code § 13107, the candidate may submit, at the time of filing his or her proposed ballot designation on the Declaration of Candidacy, a completed Ballot Designation Worksheet on a form provided by the Secretary of State.

(b) All Ballot Designation Worksheets filed with the Office of the Secretary of State or the county elections officials pursuant to this section shall be public records and shall be available for inspection and copying at the public counter of the Elections Division of the Office of the Secretary of State, Fifth Floor, 1500 11th Street, Sacramento, California 95814, or at the office of the applicable county elections official.

(c) The Secretary of State shall provide a master copy or copies of the Ballot Designation Worksheet to all elections officials responsible for providing and accepting the nomination documents for candidates in elections for offices certified by the Secretary of State. The Ballot Designation Worksheet shall request that the candidate proposing the ballot designation provide the following information:

(1) The candidate's name, home, business and mailing addresses, telephone numbers, e-mail address, if available, and fax number;

(2) A designation of the office for which the candidate is seeking election;

(3) The name, home, business and mailing addresses, telephone numbers, e-mail address, if available, and fax number of the attorney representing the candidate or for any other person to be contacted in the event the Secretary of State requires further information regarding the proposed ballot designation;

(4) The proposed ballot designation submitted by the candidate;

(5) At the option of the candidate, the candidate may submit one or more proposed alternate ballot designations ranked in order of the candidate's preference;

(6) A brief statement identifying the factual basis upon which the candidate claims the proposed ballot designation and each proposed alternate ballot designation, including the following:

(A) If the candidate holds elected office and is submitting his or her proposed ballot designation pursuant to Elections Code § 13107, subdivisions (a)(1) or (a)(2), the candidate should

indicate the elective office he or she currently occupies and may attach a copy of his or her Certificate of Election;

(B) If the candidate is a judicial officer and is submitting his or her proposed ballot designation pursuant to Elections Code § 13107, subdivisions (a)(1) or (a)(2), the candidate should indicate the elective office he or she currently holds and may attach either (A) a copy of his or her Certificate of Election or (B) a copy of his or her commission or certificate of appointment, issued at the time the candidate was appointed to the judicial office which he or she currently occupies;

(C) If the candidate submits a ballot designation pursuant to Elections Code § 13107, subdivision (a)(3), the candidate should indicate:

(i) The title of the position or positions which he or she claims supports the proposed ballot designation;

(ii) The dates during which the candidate held such position;

(iii) A description of the work he or she performs in the position;

(iv) The name of the candidate's business or employer;

(v) The name and telephone number of a person or persons who could verify such information; and

(vi) A statement that the professions, vocations or occupations relied upon to support the proposed ballot designation constitute the primary, main or leading professions, vocations or occupations of the candidate, in accordance with the definition of the term "principal" as set forth at § 20714, subdivision (b).

(D) If the candidate submits a ballot designation pursuant to Elections Code § 13107, subdivision (a)(4), the candidate should indicate the date on which he or she was appointed to the office for which he or she is an appointed incumbent.

(d) The candidate may attach or append any supporting documents or other exhibits to his or her Ballot Designation Worksheet which he or she believes support his or her proposed ballot designation. Such attached documents or other exhibits shall be deemed to be incorporated by reference as part of the candidate's Ballot Designation Worksheet and shall be considered as such by the Secretary of State.

Appendix F

§ 20714. Proposed Ballot Designations Submitted Pursuant to Elections Code § 13107, Subdivision (a)(3).

Proposed ballot designations submitted pursuant to Elections Code § 13107, subdivision (a)(3), shall be subject to the following provisions:

(a) The terms "profession," "vocation," or "occupation," as those terms are used in Elections Code § 13107, subdivision (a)(3), are defined as follows:

(1) "Profession" means a field of employment requiring special education or skill and requiring specific knowledge of a particular discipline of learning or science. The labor and skill involved in a profession is predominantly mental or intellectual, rather than physical or manual. Recognized professions generally include, but are not limited to, law, medicine, education, engineering, accountancy, and journalism. Examples of an acceptable designation of a "profession," as defined in Elections Code § 13107, subdivision (a)(3), include, but are not limited to, "attorney," "physician," "accountant," "architect," and "teacher."

(2) "Vocation" means a trade, a religious calling, or the work upon which a person, in most but not all cases, relies for his or her livelihood and spends a major portion of his or her time. As defined, vocations may

include, but are not limited to, religious ministry, child rearing, homemaking, elderly and dependent care, and engaging in trades such as carpentry, cabinetmaking, plumbing, and the like. Examples of an acceptable designation of a "vocation," as defined in Elections Code § 13107, subdivision (a)(3), include, but are not limited to, "minister," "priest," "mother," "father," "homemaker," "dependent care provider," "carpenter," "plumber," "electrician," and "cabinetmaker."

(3) "Occupation" means the employment in which one regularly engages or follows as the means of making a livelihood. Examples of an acceptable designation of an "occupation," as defined in Elections Code § 13107, subdivision (a)(3), include, but are not limited to, "rancher," "restaurateur," "retail salesperson," "manual laborer," "construction worker," "computer manufacturing executive," "military pilot," "secretary," and "police officer."

(b) "Principal," as that term is used in Elections Code § 13107, subdivision (a)(3), means a substantial involvement of time and effort such that the activity is one of the primary, main or leading professional, vocational or occupational endeavors of the candidate. The term "principal" precludes any activity which does not entail a significant involvement on the part of the

candidate. Involvement which is only nominal, pro forma, or titular in character does not meet the requirements of the statute.

(1) If a candidate is licensed by the State of California to engage in a profession, vocation or occupation, the candidate is entitled to consider it one of his or her "principal" professions, vocations or occupations if (i) the candidate has maintained his or her license current as of the date he or she filed his or her nomination documents by complying with all applicable requirements of the respective licensure, including the payment of all applicable license fees and (ii) the status of the candidate's license is active at the time he or she filed his or her nomination documents.

(2) A candidate who holds a professional, vocational or occupational license issued by the State of California may not claim such profession, vocation or occupation as one of his or her "principal" professions, vocations or occupations if (i) the candidate's licensure status is "inactive" at the time the candidate files his or her nomination document, or (ii) the candidate's license has been suspended or revoked by the agency issuing the license at the time the candidate files his or her nomination documents.

(c) In order for a ballot designation submitted pursuant to Elections Code § 13107, subdivision (a)(3), to be deemed acceptable by the Secretary of State, it must accurately state the candidate's principal professions, vocations or occupations, as those terms are defined in subdivisions (a) and (b) herein. Each proposed principal profession, vocation or occupation submitted by the candidate must be factually accurate, descriptive of the candidate's principal profession, vocation or occupation, must be neither confusing nor misleading, and must be in full and complete compliance with Elections Code § 13107 and the regulations included in this Chapter.

(d) If the candidate is engaged in a profession, vocation or occupation at the time he or she files his or her nomination documents, the candidate's proposed ballot designation is entitled to consist of the candidate's current principal professions, vocations and occupations. In the event the candidate does not have a current principal profession, vocation or occupation at the time he or she files his or her nomination documents, the candidate may use a ballot designation consisting of his or her principal professions, vocations or occupations, which the candidate was principally engaged in during the calendar year immediately preceding the filing of the candidate's nomination papers.

(e) A candidate may engage in multiple principal professions, vocations or occupations. Accordingly, the candidate may designate multiple principal professions,

vocations or occupations. If a candidate proposes a ballot designation including multiple principal professions, vocations or occupations, the proposed ballot designation must comply with the following provisions:

> (1) The proposed ballot designation must comply with the three-word limitation specified in Elections Code § 13107, subdivision (a)(3), and as implemented pursuant to subdivision (f) herein.
>
> (2) Each such proposed profession, vocation or occupation shall be separately considered by the Secretary of State and must independently qualify as a "principal" profession, vocation or occupation, as that term is defined pursuant to subdivision (b) herein.
>
> (3) When multiple professions, vocations or occupations are proposed as a ballot designation, they shall be separated by a slash ("/"). An example of an acceptable designation would be "Legislator/Rancher/ Physician."

(f) Pursuant to Elections Code § 13107, subdivision (a)(3), the candidate's ballot designation shall be limited to not more than three (3) words. The following rules shall govern the application of the three word limitation:

Appendix F

(1) The proposed ballot designation shall be grammatically correct, generic, and all words must be spelled correctly.

(2) Punctuation shall be limited to the use of a comma (e.g., District Attorney, Los Angeles County) and a slash (e.g., Legislator/ Rancher/Physician), pursuant to subdivision (e) of this section. A hyphen may be used if, and only if, the use of a hyphen is called for in the spelling of a word as it appears in a standard reference dictionary of the English language.

(3) All California geographical names shall be considered to be one word and shall be limited to the names of cities, counties and states. The names of special districts and political subdivisions are not "geographical names," as that term is used in Elections Code § 13107, subdivision (a)(3). If the candidate desires, the geographical name may be used in the form of "City of . . . ," "County of . . . ," or "City and County of . . ." Examples of geographical names considered to be one word include Tehama County, Los Angeles County and County of Sacramento.

(4) An acronym shall be counted as one word.

Appendix F

§ 20716. Unacceptable Ballot Designations.

(a) The Secretary of State shall reject as unacceptable any proposed ballot designation which fails to comply with, or is otherwise inappropriate pursuant to, Elections Code § 13107, subdivision (a); is prohibited pursuant to Elections Code § 13107, subdivision (b); is misleading; or is otherwise improper pursuant to the regulations set forth in this Chapter.

(b) The following types of activities are distinguished from professions, vocations and occupations and are not acceptable as ballot designations pursuant to Elections Code § 13107, subdivision (a)(3):

(1) *Avocations:* An avocation is a casual or occasional activity, diversion or hobby pursued principally for enjoyment and in addition to the candidate's principal profession, vocation or occupation. Avocations may include, but are not limited to, hobbies, social activities, volunteer work, and matters pursued as an amateur.

(2) *Pro Forma Professions, Vocations and Occupations:* Pro forma professions, vocations or occupations are positions held by the candidate which consume little or none of the candidate's time and which, by their nature, are voluntary or for which the candidate is not compensated. Pro forma professions, vocations and occupations may

include, but are not limited to, such pursuits as honorary peace officer, volunteer fire-fighter, honorary chairperson, honorary professor, goodwill ambassador, official host or hostess and the like.

(3) *Statuses:* A status is a state, condition, social position or legal relation of the candidate to another person, persons or the community as a whole. A status is generic in nature and generally fails to identify with any particular specificity the manner by which the candidate earns his or her livelihood or spends the substantial majority of his or her time. Examples of a status include, but are not limited to, philanthropist, activist, patriot, taxpayer, concerned citizen, husband, wife, and the like.

(c) Pursuant to Elections Code § 13107, subdivision (b)(1), the Secretary of State shall reject as unacceptable any proposed ballot designation which would mislead voters. In making this determination, the Secretary of State shall determine whether there is a substantial likelihood that a reasonably prudent voter would be misled as to the candidate's principal profession, vocation or occupation by the candidate's proposed ballot designation. The determination shall take into account the plain meaning of the words constituting the proposed ballot designation and the factual accuracy of the proposed ballot designation based upon supporting documents or other evidence

submitted by the candidate in support of the proposed ballot designation, pursuant to §§ 20711 and 20717 of this Chapter.

(d) A ballot designation may not comprise or include commercial identification information, such as a trademark, service mark, tradename, or the specific name of a business, partnership, corporation, company, foundation, or organization. Examples of an improper use of commercial identification information include, but are not limited to, "Acme Company President," "Universal Widget Inventor," "Director, Smith Foundation," "UCLA Professor," and the like.

(e) Pursuant to Elections Code § 13107, subdivision (b)(2), the Secretary of State shall reject as unacceptable any proposed ballot designation which would suggest an evaluation of the candidate's qualifications, honesty, integrity, leadership abilities or character. Any laudatory or derogatory adjectives which would suggest an evaluation of the candidate's qualifications shall not be permitted. Such impermissible adjectives include, but are not limited to, "outstanding," "leading," "expert," "virtuous," "eminent," "best," "exalted," "prominent," "famous," "respected," "honored," "honest," "dishonest," "corrupt," "lazy," and the like.

(f) Pursuant to Elections Code § 13107, subdivision (b)(3), the Secretary of State shall reject as unacceptable any proposed ballot designation which abbreviates the word "retired" or places it following

any word or words which it modifies. Examples of impermissible designations include "Ret. Army General," "Major USAF, Retired" and "City Attorney, Retired."

(g) Pursuant to Elections Code § 13107, subdivision (b)(4), the Secretary of State shall reject as unacceptable any proposed ballot designation which uses a word or prefix to indicate a prior profession, vocation, occupation or elected, appointed or judicial office previously held by the candidate. Such impermissible words or prefixes include, but are not limited to, "Ex-," "former," "past," and "erstwhile." Examples of impermissible designations include "Former Congressman," "Ex-Senator," and "Former Educator."

(h) Subject to the provisions of Elections Code § 13107, subdivision (b)(4), use of the word "retired" in a ballot designation is generally limited for use by individuals who have permanently given up their chosen principal profession, vocation or occupation. In evaluating a proposed ballot designation including the word "retired," the Secretary of State will consider the following factors in making a determination as to the propriety of the use of the term "retired":

> (1) Prior to retiring from his or her principal profession, vocation or occupation, the candidate worked in such profession, vocation or occupation for more than 5 years;

(2) The candidate is collecting, or eligible to collect, retirement benefits or other type of vested pension;

(3) The candidate has reached at least the age of 55 years;

(4) The candidate voluntarily left his or her last professional, vocational or occupational position;

(5) If the candidate is requesting a ballot designation indicating that he or she is a retired public official, the candidate must have previously voluntarily retired from public office, not have been involuntarily removed from office, not have been recalled by voters, and not have surrendered the office to seek another office or failed to win reelection to the office;

(6) The candidate has not had another more recent, intervening principal profession, vocation or occupation; and,

(7) The candidate's retirement benefits are providing him or her with a principal source of income.

(i) Pursuant to Elections Code § 13107, subdivision (b)(5), the Secretary of State shall reject as

unacceptable any proposed ballot designation which uses the name of any political party, whether or not it has qualified for recognized ballot status.

(j) Pursuant to Elections Code § 13107, subdivision (b)(6), the Secretary of State shall reject as unacceptable any proposed ballot designation which uses a word or words referring to a racial, religious, or ethnic group.

> (1) The Secretary of State shall reject as unacceptable any ballot designation which expressly contains or implies any ethnic or racial slurs or ethnically or racially derogatory language.
>
> (2) If the candidate is a member of the clergy, the candidate may not make reference to his or her specific denomination. However, the candidate may use his or her clerical title as a ballot designation (e.g., "Rabbi," "Pastor," "Minister," "Priest," "Bishop," "Deacon," "Monk," "Nun," "Imam," etc.)

(k) Pursuant to Elections Code § 13107, subdivision (b)(6), the Secretary of State shall reject as unacceptable any proposed ballot designation which refers to any activity prohibited by law. Unlawful activity includes any activities, conduct, professions, vocations, or occupations prohibited by state or federal law.